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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1231

JOE HENDREX,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. .....

JOE HENDREX,
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v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joe Hendrex, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on January 19, 1968, and is not officially reported. A copy of the opinion is set forth in Appendix A, *infra,* p. 13. Timely Petition for Rehearing was filed and was denied by the court on February 14, 1968. A copy of Order Denying Rehearing is set forth in Appendix B, *infra,* p. 15.

No opinion was rendered by the trial judge but a copy of his sentence and commitment filed January 20, 1967, is set forth in Appendix C, *infra,* p. 16.

On application of petitioner the Court of Appeals on February 21, 1968, stayed its mandate pending the filing of this Petition for Certiorari. A copy of letter from the Clerk of the Court of Appeals dated February 21, 1968, advising of such stay is set forth in Appendix D, *infra,* p. 17.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 19, 1968 (Appendix A). Timely Petition for Rehearing was denied February 14, 1968 (Appendix B).

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

I.

Does the mere transfer of narcotics by one sharing an apartment with petitioner, to an undercover agent, not in the presence of defendant, sufficiently corroborate petitioner's extra-judicial statement of his complicity with the transferror to warrant a conviction of aiding and abetting?

II.

Where petitioner had been convicted on two counts and sentenced to a term of eight years on each, sentences to run concurrently, was the Court of Appeals in error in failing to pass on the validity of his conviction on Count Two, while affirming his conviction on Count One, in view of the fact that the statutory provision provided for indeterminate sentence of from five to twenty years?

III.

Was petitioner denied his constitutional rights under the Sixth Amendment to the United States Constitution because his co-participant in the crime (but not co-defendant) was not brought to trial prior to the trial of petitioner and, therefore, refused to testify, claiming privilege against self-incrimination, where petitioner had previously taken the deposition of such co-participant and had subpoenaed him as a witness at the trial?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States set forth in Appendix E, *infra,* p. 18.

The statutory provisions, 26 U.S.C., section 4705 (a); 18 U.S.C., section 2; 21 U.S.C., section 174, and 26 U.S.C., sections 7237 (b) and (d) are set forth in Appendix F, *infra,* p. 19.

STATEMENT OF THE CASE

(Figures in parentheses followed by the letter "a" refer to pages of Defendant's Appendix, unless context clearly indicates otherwise.)

Petitioner, following a jury trial, was convicted in the District Court for the Eastern District of Michigan, Southern Division, on a two count indictment charging him with aiding and abetting the illegal sale of narcotics in violation of 26 U.S.C., section 4705 (a), and 18 U. S. C., Section 2, and with receiving and concealing illegally imported narcotics in violation of 21 U.S.C., Section 174. He was sentenced to imprisonment for eight years on each count with the sentences to run concurrently.

The government's case was made out by the testimony of one witness, McClaren, an undercover man. He testified that, after some preliminaries, he went to petitioner's apartment and made inquiry about buying some narcotics. He stated that then petitioner said "he would get his man Ray (Jones) to take care of the business" (13a). He also testified that petitioner left the room, Jones came in, he made the purchase from Jones who then left, and then petitioner returned and asked "if everything was all right. And I told him that it was" (14a).

McClaren conceded that he had made three prior purchases from Jones and that petitioner had never been involved in any way in any one of them (24a).

Petitioner contended that under Count One of the indictment, aiding and abetting, the *corpus delicti* of the crime so far as he was concerned was his participation in the unlawful sale through Jones, his agent. Likewise, under Count Two, the *corpus delicti*, as claimed by the government, was petitioner's unlawful constructive possession of narcotics through his agent Jones. As shown by the record, the government's attorney relied almost entirely upon petitioner's statements as establishing an agency (51a-53a). The court in its charge similarly stressed the agency of Jones (112a-117a).

Count Two was based upon Section 174, Title 21 U.S. Code. So far as here material it punishes any person who "receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug". There is nothing in this section of the statute which makes possession of narcotic drugs a crime although the last paragraph of the section makes proof of possession without sufficient explanation enough to sustain a conviction.

The trial court in its charge to the jury stated that Count Two charged that petitioner "did unlawfully receive and conceal and have in his possession" (110a). The record shows (112a) that the court again said "In the Second Count he is charged with having unlawfully received and concealed and had in his possession the same quantity of drugs without compliance with the law". The court then went on to explain at considerable length to the jury the difference between actual and constructive possession.

The Court of Appeals brushed aside petitioner's complaint about the illegality of his conviction on Count Two because of the trial judge's erroneous and insufficient instructions, by merely stating that inasmuch as he was lawfully convicted on Count One it made no difference whether his conviction on Count Two was proper since there was no parole available on the sentence on Count One and the sentences on each count were the same and would run concurrently.

After the government had rested its case petitioner called as a witness his alleged co-participant, Raymond Cornelius Jones, who was accompanied by his counsel. He declined to answer whether he knew petitioner, on the basis of the Fifth Amendment. The court sustained the objection and ruled that he was not obligated to answer any further questions except one asked by the government attorney as to whether he was awaiting trial in Federal Court on a narcotics matter (88a). This question Jones answered affirmatively (89a). Petitioner's counsel objected to the court's ruling pointing out that he earlier had taken Jones' deposition and that he had subpoenaed Jones to testify for the defense (88a).

Petitioner's contention that the government by maneuvering the sequence of the trials of petitioner and of Jones, whom he is alleged to have aided and abetted, had effectively deprived petitioner of his constitutional right under Amendment Six to have witnesses in his behalf was similarly brushed aside by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

A.

THE COURT OF APPEALS' CONCLUSION THAT THERE WAS SUFFICIENT CORROBORATION OF PETITIONER'S PARTICIPATION IN THE CRIME WAS CONTRARY TO SETTLED RULES OF FEDERAL LAW.

In answer to petitioner's contention that his extra-judicial statements were insufficient to prove the *corpus delicti* of the crime, i.e. his participation through his alleged agent Jones, the Court of Appeals said that these statements were corroborated by (1) the transfer of narcotics and (2) petitioner's control of the premises.

It did not say it disagreed with petitioner's claim that extra-judicial admissions alone were insufficient to convict a defendant as held in *Kelly v. United States,* 1957, C.C.A. 10, 246 F.2d 864, and *Gulotta v. United States,* 1940, C.C.A. 8, 113 F. 2d 683, and *Pines v. United States,* 1941, C.C.A. 8, 123 F. 2d 825.

While the transfer of the narcotics might be corroborative of Jones' participation, it could not be corroborative of petitioner's participation because the sale was made, admittedly, not in his presence (34a). The mere fact of his presence in the apartment in which Jones too lived, was also not corroborative of his participation under the holding of *Jackson v. United States,* 1957, C.A.D.C., 250 F.2d 772, and *United States v. Contrades,* 1961, D.C. Hawaii, 196 F.S. 803. Cf. *Massei v. United States,* C.C.A. 1, 241 F.2d 895, aff'd 355 U.S. 595, 2 L. Ed. 2d 517, 78 S. Ct. 495.

The holding of the Court of Appeals in this case is inconsistent with its earlier decision of *United States v. Duff,* 1964, C.C.A. 6, 332 F. 2d 702, where the sale was made in defendant's apartment and yet the court reversed her conviction.

B.

THE COURT OF APPEALS ERRED AND DENIED PETITIONER DUE PROCESS OF LAW IN REFUSING TO PASS UPON THE VALIDITY OF PETITIONER'S CONVICTION UNDER COUNT TWO BECAUSE IT FOUND THAT HE WAS PROPERLY CONVICTED UNDER COUNT ONE, AND THE SENTENCES WERE FOR EIGHT YEARS ON EACH COUNT TO RUN CONCURRENTLY, ALTHOUGH THE STATUTORY PROVISION PROVIDED FOR INDETERMINATE SENTENCE OF FROM FIVE TO TWENTY YEARS.

The trial judge's charge made it clear that mere possession, either constructive or actual, constituted a violation of the federal statute and made petitioner guilty under Count Two.

Nowhere in the court's charge is there any attempt to instruct the jury that they might find either from the government witness' or petitioner's testimony a satisfactory explanation of the possession which the government claimed he had of the narcotics. Such an explanation, under the statute, would support his innocence. The jury might well have concluded, with a proper instruction, that petitioner's explanation that he did not have possession, that Jones had the possession, and that he did not know Jones was in the business of selling narcotics, was a sufficient explanation to exculpate him. The fact that Jones had, on three previous occasions, sold narcotics to the government agent, with no involvement of petitioner (24a), could well have inclined the jury under proper court instruction to accept petitioner's version of the facts.

That the jury considered only the question of possession is obvious from the fact that it returned for further explanation by the judge of that term and within 20 minutes reached a verdict of guilty (118a).

The Court of Appeals in its decision held that it need not determine the validity of conviction on Count Two because his conviction on Count One was proper and since the sentence on each count was the same and to run concurrently it was of no moment. That court also held, that petitioner's suggestion that an unreversed conviction on Count Two could possibly have an adverse effect on his opportunity for parole, was of no force because parole on conviction under Count One was precluded by 26 U.S.C. 7237 (d).

On rehearing petitioner unsuccesssfully urged the Court of Appeals to reconsider its position for several reasons.

First, if an accused has been unlawfully convicted of a crime, the court should so say.

Second, since both counts one and two arose out of identical facts and were supported by identical proofs, it may well be said that only one crime was committed and one count should have been eliminated. *Bell v. United States,* 1954, 349 U.S. 81, 99 L. Ed. 905, 75 Sup. Ct. 620; *Anderson v. United States,* 1951, C.C.A. 6, 189 F. 2d 202.

See also *Rayborn v. United States,* 1956, C.C.A. 6, 234 F. 2d 368.

Under the authority of *Smith v. United States,* 1954, C.C.A. 6, 211 F. 2d 957, there should have been but one sentence.

Third, if perchance this petitioner is ever again convicted of a crime, the then sentencing judge will undoubtedly be less favorably inclined when faced with prior convictions on *two* counts than he would be with a prior conviction on but one count.

Fourth, the statute (26 U.S.C. Sec. 7237 (d)) provides for a penalty of not less than 5 nor more than 20 years.

Petitioner was sentenced to 8 years on *each count*. It may very well have been the intention of the trial judge to impose more than the minimum because petitioner had been found guilty on *both* counts.

Fifth, while there is no parole available under the statute, the power to pardon (Article II, Sec. 2, United States Constitution) is not precluded. Conceivably, although perhaps highly improbable, petitioner, while in custody, might volunteer for medical or scientific experiment, thus earning consideration for pardon or reprieve. A conviction on but one count would here present for him a more favorable appeal than convictions on two counts.

Even though the Court of Appeals sustained the Count One conviction, it should have reversed the Count Two conviction, and remanded for re-sentence on the one count in the light of the statutory 5 to 20 years indeterminate sentence.

C.

THE COURT OF APPEALS ERRED IN HOLDING THAT FAILURE OF THE GOVERNMENT TO FIRST TRY AND SENTENCE (IF FOUND GUILTY) RAYMOND CORNELIUS JONES, DEFENDANT'S ALLEGED CO-PARTICIPANT IN THE CRIME, DID NOT DEPRIVE DEFENDANT OF HIS RIGHT TO PRESENT WITNESSES ON HIS OWN BEHALF AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner argued to the Court of Appeals that the government, by ordering this defendant to trial before Jones, effectively deprived him of Jones' favorable testimony. The record shows that a deposition of Jones had been taken and that he had been subpoenaed as a witness for petitioner (88a), obviously indicating that his testimony

would have been favorable. But Jones, in view of his pending trial, wisely claimed his privilege.

We submit that *United States v. Echeles,* 1955, C.C.A. 7, 352 F. 2d 892, 898, fully supports our position. We further submit on this point the case of *Washington v. Texas,* 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920, decided June 12, 1967, some time after our brief was written for the Court of Appeals.*

In *Washington,* a Texas statute precluded an accomplice from testifying for an accused. The accomplice, Fuller, was willing to testify in favor of accused but the Texas courts refused to let him do so in view of the statute. The court reversed and held the statute unconstitutional:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

> "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."

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* *Washington v. Texas,* was called to the attention of the Court of Appeals in Petitioner's Petition for Rehearing.

In *Washington,* the state, through its legislature, prevented defendant from presenting his witness. In this case of Hendrix, the Government, by maneuvering the order of trials effectively prevented petitioner from presenting a favorable witness. Neither governmental procedure is less reprehensible than the other. Both are violative of the Sixth Amendment to the United States Constitution.

CONCLUSION

The Court of Appeals' departure from settled rules of federal law and its sanctioning of the government's right to manipulate trials of related defendants, thus denying petitioner his rights under the Sixth Amendment, warrant review by this court by Writ of Certiorari.

Respectfully submitted,

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Detroit, Michigan 48226.

APPENDIX A

No. 17,801

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

United States of America, *Plaintiff-Appellee,* v. Joe Hendrex, *Defendant-Appellant.*	On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

(Filed January 19, 1968)

Decided January 19, 1968

Before: Weick, Chief Judge, and Edwards and McCree, Circuit Judges.

Per Curiam. Appellant, following a jury trial, was convicted on both counts of a two-count indictment charging him with aiding and abetting the illegal sale of narcotics in violation of 26 U.S.C. §4705(a) and 18 U.S.C. §2, and with receiving and concealing illegally imported narcotics in violation of 21 U.S.C. §174. He was sentenced to imprisonment for eight years on each count with the sentences to run concurrently.

Appellant contends that his constitutional right to call witnesses to testify in his behalf was violated by a delay in the commencement of his trial, and that he was further

prejudiced by certain comments of the prosecutor during the course of the trial. We find these contentions to be without merit.

With specific reference to count one of the indictment, appellant contends that the indictment fails to charge a crime, Count one alleges that appellant "did aid and abet one Raymond Cornelius Jones who is not charged as a defendant herein but who did unlawfully and knowingly sell" narcotics. It is appellant's contention that this indictment does not charge that he aided and abetted Jones *in the commission of the crime.* While the indictment could have been worded with greater precision, it nevertheless "sufficiently apprises the defendant of what he must be prepared to meet," and we therefore find it to have properly charged appellant with the offense of which he was convicted. *United States v. Debrow,* 346 U.S. 374, 376 (1953).

As part of its proof of the offense charged in count one, the government called an undercover agent of the Bureau of Narcotics to testify regarding statements made by appellant at the time of the alleged sale. Appellant contends that these statements alone cannot provide a basis for conviction. It is a sufficient answer to this contention to observe that the government did not rely solely on these statements, but also on such corroborative facts as the transfer of narcotics and the appellant's control of the premises where the sale was made.

Appellant also contends that the jury received improper instructions concerning count two of the indictment. The sentence imposed under count two is concurrent with that under count one and since we have found no error relating to the general conduct of the trial and no error relating to count one, it is unnecessary to review appellant's allegations with regard to count two. *United States v. Romano,* 382 U.S. 136 (1965); *Zachary v. United States,* 275 F.2d 793 (6th Cir.

1960); *cert. denied,* 364 U.S. 816 (1960). Appellant contends, however, that an unreversed conviction on count two may have an adverse effect on his opportunity for parole. Whatever force this argument may have in other circumstances, it is without weight here because conviction for violation of 26 U.S.C. §4705(a), as charged in count one, precludes parole. 26 U.S.C. §7237(d).

The judgment of the district court is affirmed.

APPENDIX B

No. 17,801

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.
Joe Hendrex,
Defendant-Appellant.

ORDER

(Filed February 14, 1968)

Before: Weick, Chief Judge, Edwards and McCree, Circuit Judges.

The petition for rehearing having come on to be heard, upon consideration, it is Ordered that the petition be, and it hereby is denied.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.

APPENDIX C

JUDGMENT AND COMMITMENT

(Filed January 20, 1967)

On this 20th day of January, 1967 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Sections (Vio.) 174, Title 21, 4705(a), Title 26, and 2, Title 18 U.S.C. (Possession and sale of narcotics) as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eight (8) years on each of the two (2) counts of the indictment. The aforesaid sentences are to be served concurrently and not consecutively. It Is Further Adjudged that the appearance bond be cancelled.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Theodore Levin,
Chief United States
District Judge.

Approved as to form:
/s/ Howard E. O'Leary

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Sixth Circuit
Cincinnati, Ohio 45202

17,801

February 21, 1968

Messrs. Sanford Rosenthal and
George Stone
3100 Guardian Building
Detroit, Michigan

Re: United States of America v.
Joe Hendrex—No. 17,801

Gentlemen:

The Court entered an order today staying the mandate in the above-entitled case until final disposition of the petition for writ of certiorari in the United State Supreme Court. The time for filing such petition for certiorari expires on March 15, 1968.

We will prepare the certified record for certiorari application and mail it to the Clerk of the Supreme Court upon receipt of your check in the amount of $7.30. See rule 23(8).

Yours very truly,

Carl W. Reuss, Clerk

/s/ Mary McLohre
Deputy Clerk.

CC: Mr. Lawrence Gubow
United States Attorney
Federal Building
Detroit, Michigan

APPENDIX E

SIXTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

FIFTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

APPENDIX F

STATUTES INVOLVED

Section 2, Title 18, United States Code:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Section 4705(a), Title 26, United States Code:

(a) It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

Section 174, Title 21, United States Code:

Whoever * * * receives, counsels, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law * * * shall be imprisoned * * *.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed

sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 7237(b), Title 26, United States Code:

Whoever commits an offense, or conspires to commit an offense, described in Section 4705(a) or Section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000.

Section 7237(d), Title 26, United States Code:

Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section • • •

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

SUPREME COURT, U. S.

No. 1231

APR 11 1968

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOE HENDREX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D. C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1231

JOE HENDREX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of aiding and abetting Raymond Jones (who was not charged in the indictment) in the illegal sale of narcotics and of receiving and concealing illegally imported narcotics (26 U.S.C. 4705(a); 21 U.S.C. 174). On January 20, 1967, he was sentenced to eight years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed *per curiam* (Pet. App. A).

The government's evidence showed that during the evening of March 13, 1966, narcotics agent McClaran telephoned petitioner at his home and asked him whether any narcotics were available. Petitioner told McClaran to come to his apartment (Tr. 6-7).[1] About an hour later McClaran arrived and met petitioner and Jones, with whom he had previous dealings in narcotics (Tr. 10, 22). Shortly thereafter Jones left the room. Petitioner and McClaran then had a conversation in which the agent agreed to buy thirteen packets of heroin for $75. Petitioner told McClaran he would "get his man * * * to take care of it". Petitioner left the room. A few moments later Jones entered, removed thirteen packets of heroin from his pockets, and handed them to McClaran. McClaran paid Jones $75 (Tr. 11). Petitioner re-entered the room after the transfer had taken place, while the narcotics were in McClaran's hands. He asked if everything was all right. After some further conversation, McClaran departed (Tr. 11, 20-21).

Petitioner testified that he had not been involved in the transaction.

1. Petitioner contends that his conviction should be reversed because there was insufficient evidence to corroborate his "admissions" (Pet. 7). However, petitioner's statements to McClaran at the time of the transaction were not after-the-fact admissions requiring corroboration, *Warszower* v. *United States*, 312 U.S. 342, 347-348; compare *Opper* v. *United States*, 348 U.S. 84; *Smith* v. *United States*, 348 U.S. 147;

[1] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

Kelly v. *United States*, 246 F. 2d 864 (C.A. 10); they were part of the transaction itself. The evidence of petitioner's statements and negotiations with the agent followed immediately by the delivery of the narcotics by Jones is more than sufficient to sustain his conviction.

2. The trial judge charged on Count 2 that, if the jury should find beyond a reasonable doubt that petitioner possessed the narcotics, that was sufficient to justify conviction on the basis of the presumption contained in 21 U.S.C. 174 (Tr. 117). The court of appeals declined to consider petitioner's challenge to this instruction, since petitioner had received concurrent sentences and there was no possibility of parole. This course was proper. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; see *United States* v. *Romano*, 382 U.S. 136.

Moreover, petitioner's counsel did not object to this portion of the charge (Tr. 118). And since petitioner did not attempt to explain his possession of the narcotics the court's charge in this regard was not plain error.

3. Jones was called as a defense witness (Tr. 87-88). He refused to answer any questions pertaining to the substance of the prosecution and invoked the Fifth Amendment. Defense counsel brought out the fact that Jones had been subpoenaed to appear [2] and was then awaiting trial (Tr. 89-90). Apparently,

[2] The subpoena had been issued the previous day during the government's case. The trial judge, at the conclusion of the government's evidence, granted a half day continuance to permit the defense to prepare (Tr. 45).

counsel had also previously taken Jones' deposition (Tr. 90).[3]

Petitioner contends that it was error not to have required the prosecution to try Jones first so that he would have been available to petitioner as a witness. In *United States* v. *Echeles*, 352 F. 2d 892, 897-898 (C.A. 7), relied upon by petitioner (Pet. 11), the court held that a severance should have been granted as to a co-defendant where the defendant had made known his intention to call the co-defendant as a witness, and the co-defendant had evidenced a willingness to testify in exculpation of the defendant. The court indicated that, after granting the severance, the trial judge should have ordered the co-defendant tried first. The instant case differs from *Echeles* because here the trial judge was not informed prior to trial of petitioner's intention to call Jones as a witness. The courts have uniformly held that in such circumstances it is not error to deny a severance among co-defendants. *E.g.*, *United States* v. *Kahn*, 366 F. 2d 259, 263 (C.A. 2), certiorari denied, 385 U.S. 948; *Brown* v. *United States*, 375 F. 2d 310, 316 (C.A.D.C.), certiorari denied, 388 U.S. 915. *A fortiori* there would be no reason for a judge in the middle of a trial to direct a change in the order of separate trials.[4]

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[3] The nature of the purported deposition was not disclosed. Counsel did not attempt to rely on Jones' statements therein as constituting a waiver of his privilege.

[4] *Washington* v. *Texas*, 388 U.S. 14, cited by petitioner (Pet. 11), is not apposite. There the Court held only that a Texas statute *forbidding* an accomplice to testify on behalf of an ac-

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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cused was unconstitutional. Here no compulsion of law prohibited Jones from testifying for petitioner.

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IN THE

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OCTOBER TERM, 1967

No. 1231

JOE HENDREX,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO MEMORANDUM OF RESPONDENT

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Respondent.

PETITIONER'S REPLY TO MEMORANDUM OF RESPONDENT

Respondent's answer to Point B of our petition that the Court of Appeals was not required to pass on the validity of the Count 2 conviction because the sentences were concurrent and there was no possibility of parole, ignores reality.

This court said, in a somewhat similar situation, in *United States v. Morgan*, 346 U.S. 502, 512, 513, 74 S. Ct. 247, 98 L. Ed. 248:

> "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties."

The trial court's instructions to the jury on Count 2 were sorely inadequate. None of the safeguards relating to finding of guilt from mere unexplained possession were given as was done in *United States v. Gainey,* 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658.

The inference-of-guilt from unexplained possession statutes should now be re-examined by this court in the light of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2nd 694. The Court of Appeals of Florida, in *Young v. Florida,* 203 S. 2d 650, decided on November 14, 1967, that unexplained possession can no longer be used as evidence of guilt in view of *Miranda, supra:*

> "The instruction given to the jury had the effect to demand of the defendant an affirmative explanation for the reason the stolen goods were in his possession. At the same time defendant being in police custodial interrogation within the meaning of Miranda would have had the privilege to remain silent. The privilege to remain silent would be a hollow privilege if that silence would create an inference of guilt at the trial. The fact that the defendant remained silent was used against him at trial in the form of the aforementioned jury instruction in violation of the defendant's Fifth Amendment privilege under the Miranda decision."

Respectfully submitted,

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